



# In The Supreme Court of Bermuda

## CIVIL JURISDICTION

**2020: 474**

EWART F. BROWN

Applicant

-v-

THE DIRECTOR OF PUBLIC PROSECUTIONS

1<sup>st</sup> Respondent

THE ATTORNEY GENERAL

2<sup>nd</sup> Respondent

THE DEPUTY GOVERNOR

3<sup>rd</sup> Respondent

AND

## CRIMINAL JURISDICTION

**2021: 09**

THE QUEEN

-v-

EWART F. BROWN

## RULING

*Second Application on Fresh Evidence  
for Recusal of Trial Judge on grounds of an Appearance of Bias*

Date of Hearing: 02 March 2022

Date of Delivery of Ruling: 17 May 2022

Appearances in the Civil Proceedings:

The Applicant Mr. Delroy Duncan QC, Trott & Duncan Limited

1<sup>st</sup> Respondent Ms. Elizabeth Christopher, Christopher's

2<sup>nd</sup> Respondent Mr. Brian Moodie, Crown Counsel for the Attorney General

3<sup>rd</sup> Respondent Mr. Mark Diel, Marshall Diel & Meyers Limited

Appearances in the Criminal Proceedings:

The Crown Mr. Alan Richards for the Director of Public Prosecutions

The Accused Mr. Jerome Lynch QC, Trott & Duncan Limited

RULING delivered by Shade Subair Williams J

**INTRODUCTION**

1. This is a second application for my recusal. It is grounded on new evidence and follows the previous written ruling of this Court made on 10 September 2021 whereby I rejected the first application for my recusal. Both recusal applications concern complaints of apparent bias rather than actual bias.
2. The evidence which is relied on is an extension of the facts which were previously before me in respect of the history between Dr. Ewart F. Brown (the Applicant and Accused person) and Dr. H.O. Subair (my father). At the request of the Applicant, via his Counsel Mr. Delroy Duncan QC, the nature and particulars of the new evidence was sealed from public access by an Order of this Court.

## PROCEDURAL BACKGROUND

3. The facts newly before this Court were filed pursuant to my direction of 20 October 2021 in the course of Dr. Brown's application for leave to appeal against the first recusal ruling of 10 September 2021. (The Applicant's un-argued position was that he had a right of appeal against that first ruling since it concerned the constitutional complaint against the investigation and prosecution of Dr. Brown which was filed as separate civil proceedings.) As a preliminary point to the making of that leave application, Mr. Duncan QC informed the Court that the Applicant's grounds for leave to appeal would involve the filing of new evidence which he contended would strengthen Dr. Brown's case for my recusal. However, I directed the Applicant that the new evidence should first be formally placed before me to allow this Court to reassess its position. In doing so, this Court recognised that a ruling on the question of judicial impartiality must continuously be kept under review by the judge concerned.
4. The application for leave to appeal was accordingly adjourned to Friday 12 November 2021. It was envisaged by the Court that the new evidence would be filed in the interim period leaving sufficient time for my consideration of that material prior to the 12 November return date. However, it was not until the eve of that return date that the additional information was filed.
5. By a written submission dated 10 November 2021, Mr. Duncan QC filed the particulars of the new evidence on 11 November 2021 under the protection of a sealing order of this Court. In an email communication to Mr. Duncan QC, I confirmed that the 12 November hearing would necessarily be adjourned to allow me sufficient time to consider whether I would recuse myself without the need for further oral submissions. Notwithstanding, I directed that the other parties should be served with a copy of my correspondence together with the 10 November written submission. I also confirmed that the December 2021 fixture for the strike-out application of the constitutional complaint would be delisted in light of the pending appeal proceedings against my first recusal ruling.
6. Subsequently, a hearing was directed by this Court to enable oral submissions to be made by all of the parties on the new factual issues raised. That hearing was fixed for Friday 10 December 2021. (This 10 December fixture had originally been fixed for the strike out application). However, on 8 December 2021 Mr. Lynch QC wrote to the Court seeking an adjournment of that hearing on grounds relating to his trial calendar in another jurisdiction. Mr. Lynch's request was accommodated by this Court and the relisted hearing date was fixed for 2 March 2022 when the present recusal application was heard.

## ANALYSIS AND DECISION

7. On behalf of the DPP Ms. Christopher alongside Mr. Diel, appearing on behalf of the Deputy Governor, maintained their objections to the application for my recusal. Counsel for the Attorney General remained neutral. The overarching point made by the objecting Counsel was that the new evidence relied on ought not to be allowed as it was factual information which had been available for the Applicant's use long before he made the first application for my recusal. Ms. Christopher also submitted that the new evidence was of no real consequence or significance to the Applicant's evidence of a hostile relationship with my father.
8. In light of the sealing order made, I am restricted from providing any narrative which publicly outlines any of the details of the new evidence. However, it can be safely said that the evidence was intended by Dr. Brown to be supportive of his contention that there is and continues to be a strained personal and professional relationship between him and my father, Dr. H.O. Subair.
9. In my first ruling, I found that there was no evidence before me from which it could be reasonably inferred that Dr. Subair was aware or shared in the longstanding hostility asserted by Dr. Brown. I also confirmed that I had no personal knowledge of that sort. However, on the facts now before me, I am bound to find that the evidence before me is sufficiently probative of the Applicant's case that the effects of the 1996 business arrangement was such that there remained thereafter an estrangement between my father on the one hand and the other doctors on the other.
10. These are not adjudicated findings of fact as all I am required to do is to consider whether an informed and fair-minded observer would think that there is a real risk of bias on my part having considered the unchallenged evidence filed before this Court.
11. That being said, I acknowledge the Respondents' criticism that this new evidence is not so new and that it ought to have been filed in the first instance, saving an inordinate amount of time and costs. However, the requirement for the appearance of judicial impartiality is constitutional and supreme; so an adequate case for recusal in this instance cannot be held hostage on account of the Applicant's belatedness in raising this additional evidence.
12. I find that in order for justice to be both done and seen to be done, I am now compelled to err on the side of caution and grant the application for my recusal on the basis that a fair-minded and informed observer would likely find that there is a real risk that I would be

partial against an Accused person who has filed evidence suggestive of a long-standing and reciprocal feud between him and my father.

## **CONCLUSION**

13. I grant the application for my recusal and direct that these proceedings shall be tried before another judge.
14. Arrangements shall be made by or on behalf of the DPP, in corresponding with the Registry, for the criminal proceedings in this matter to be listed in an upcoming Court session for mention.
15. The parties to the civil proceedings may be heard on the issue of costs upon the filing of a Form 31D within 21 days of the date of this Ruling.

Dated this 17<sup>th</sup> day of May 2021

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**THE HON. MRS JUSTICE SHADE SUBAIR WILLIAMS  
PUISNE JUDGE OF THE SUPREME COURT**